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IN THE

**Supreme Court of the United States**

OCTOBER TERM—1943

No. 827

ELEANOR G. MURPHY,  
*Petitioner,*  
*against*

THE CITY OF ASBURY PARK,  
a Municipal Corporation,  
*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, AND BRIEF IN SUP-  
PORT THEREOF**

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

*To the Honorable Chief Justice and the Associate Justices  
of the Supreme Court of the United States:*

Eleanor G. Murphy, the petitioner herein, respectfully prays a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Third Circuit, reversing a judgment for Twenty-Five Thousand (\$25,000.00) Dollars, in favor of the petitioner and against the respondent, for personal injuries caused by the active wrongdoing of the respondent municipality. *Murphy v. City of Asbury Park*, 139 Fed. (2nd) 888.

The common law of New Jersey, as enunciated by repeated decisions of its highest courts, declares a municipality is liable in damages for its active wrongdoing. Active wrongdoing has been defined as the wrongful and injurious

exercise of lawful authority, the doing of a lawful act in an unlawful manner, an act of misfeasance. *Allas v. Borough of Rumson*, 115 N. J. L. 593; 181 Atl. 175; 102 A. L. R. 648.

Active wrongdoing exists where a municipality, under legislative authority, performs an act but fails to provide adequate protection or make a proper installation. The decision of the Circuit Court of Appeals was predicated upon the ground that the respondent was not subject to liability for its active wrongdoing, because it was protected by statutes which authorized its action. In the District Court, in an opinion based upon the prevailing decisions of New Jersey, District Judge FORMAN had previously denied the motion of the municipality to set aside the verdict, and held that there was evidence of active wrongdoing on the part of the City which warranted submission of its liability to the jury. *Murphy v. City of A. P.*, 49 F. Supp. 39 (Appellant—Appendix, 85a). The Circuit Court of Appeals entirely disregarded the common law of New Jersey.

Active wrongdoing is the doing of a lawful act in an unlawful manner. Despite the uniform rule in that jurisdiction that general statutory authority does not bar recovery for private injuries resulting from the creation of a nuisance by a municipality, the Circuit Court of Appeals held that two general statutes absolved the municipality from liability. This decision is contrary to the common law of New Jersey where the cause of action arose, and disregards the principle of *Erie R. Co. v. Tompkins*, 304 U. S. 64.

### **Statement of the Case**

Eleanor G. Murphy on January 20, 1940, received personal injuries when the car in which she was riding collided with a concrete base constructed in the center of Ocean Avenue, a well-travelled street in the City of Asbury Park,

New Jersey. Upon the concrete base was a lighting standard. The driver of the car in which she was riding had turned to the center of the street to avoid another car pulling out from the curb, and struck the base. The driver did not see the base and testified the fixture was not lighted (Appellee—Appendix, 33a, 34a). A county and municipal engineer (Appellant—Appendix, 45a to 53a), and a State highway engineer (Appellant—Appendix, 20a to 35a), declared that the base was improperly placed, and was constructed without protective devices, curbs or islands. Above the base was a standard which was part of the street illumination system (Appellant—Appendix, 39a; Appellee—Appendix, 2a). The City in 1921 enacted an ordinance which directed "that the necessary drains and sewers and standard lamps necessary in connection with the improvements to Ocean Avenue be installed and completed" (Appellant—Appendix, 74a). In 1917 the New Jersey Legislature had passed the Municipalities Act, known as "The Home Rule Act," and at page 410 P. L. 1917, Chapter 152, provided:

"The Governing body of every municipality shall have power by ordinance to cause the streets and public places of such municipalities to be lighted \* \* \* and to erect and maintain on or under such streets and public places all necessary poles, conduits, wires, fixtures and equipment" (Appellant—Appendix, 84a).

In 1923 a statute was enacted which reads:

"The governing body of every municipality shall have the power to establish safety zones, to erect, construct and maintain platforms; to erect, construct, maintain and operate standards; beacon lights, guide posts or other structures which in its judgment may be necessary for the safety and convenience of persons and vehicles using the streets in said municipality."

No evidence was presented by the defendant that the structure had been erected as part of a traffic system. The defendant moved, during the trial, for a non-suit and at the close, for a directed verdict, upon the ground that the two statutes authorized the structure and the City was absolved from the consequences of its active wrongdoing (Appellee—Appendix, 6a to 32a).

The District Court denied both motions, holding that the cited statutes were not of such specific, precise and definite character as to authorize obstructions in the highway, and that the City was obligated to refrain from active wrongdoing in the construction and placing of the bases.

After the verdict for the plaintiff, the defendant moved to set aside the judgment and for entry of judgment in its behalf upon the same grounds. District Court Judge FORMAN, in his opinion, denied the motion and followed the prevailing decisions of New Jersey which hold that a municipality is liable for a nuisance if it improperly constructs an obstruction in the highway, and that it is not absolved from responsibility for its active wrongdoing, by a general statute empowering a municipality to erect a lighting or traffic system (Appellant—Appendix, 85a).

Upon appeal, the Circuit Court of Appeals for the Third Circuit reversed the judgment, holding that the statutes had authorized the structure and legalized what would otherwise have been a nuisance, and hence the City was not liable for its active wrongdoing.

The petitioner now seeks certiorari to reverse that decision.

### **Jurisdiction**

The jurisdiction of this Court to entertain and grant this petition is provided by Section 347 of Title 28 of the U. S. Code. Definitely involved is a decision of the Circuit

Court of Appeals, upon an important question of local law, holding a municipality free from liability for active wrongdoing, contrary to and in conflict with local decisions imposing such liability upon a municipality while acting under statutory authority.

### **The Questions Presented**

The District Court in its opinion dismissing the motion to set aside the verdict and enter judgment in favor of the defendant City, correctly held that whether an obstruction constructed in a public street under a general statute was safely and properly erected was a question for the jury and that the decision of the jury that the City was guilty of active wrongdoing, when the construction was improper, was in accordance with the uniform decisions of the Court of last resort of New Jersey.

The Circuit Court of Appeals in reversing this judgment disregarded the applicable decisions of local law.

The questions presented by this petition are:

1. Is a New Jersey municipality which erects a structure in the center of a public highway, contrary to standard and approved methods, and with no protective devices, liable for active wrongdoing under the controlling decisions of New Jersey?
2. Does the existence of general statutes under which a New Jersey municipality alleges it is authorized to erect an obstruction in the street, absolve it from liability for construction contrary to standard methods and without proper safeguards?
3. Is a municipality of New Jersey liable for the wrongful and improper erection of an obstruction in a public high-

way, and only exempt from liability if the erection of such obstruction is authorized by a specific, precise, exact and definite legislative authority?

### Opinions Below

The opinion of District Judge FORMAN denying the motion to set aside the verdict is reported in 49 F. Supp. 39 (Appellant—Appendix, 85a, *et seq.*). The decision is based upon the leading case of *Allas v. Borough of Rumson*, 115 N. J. L. 593; 181 Atl. 175; 102 A. L. R. 648, which has been consistently followed in New Jersey. District Judge FORMAN held that the municipality was liable for its active wrongdoing in erecting obstructions in the public highway contrary to standard practice and without proper safeguards. General statutes did not exempt the municipality from liability for improperly erecting what would be otherwise a lawful construction. The District Court Judge clearly distinguished the exception to this general doctrine. An obstruction in the highway which would otherwise be a nuisance may be legalized by precise, definite, exact and specific legislation and, when erected strictly in accordance with the specifications of the legislative enactments, will not impose liability upon the municipality.

The Circuit Court of Appeals in its opinion failed to distinguish between general statutes under which a municipality is always liable for active wrongdoing and those statutes which prescribe definitely, precisely, exactly and specifically the manner in which an obstruction may be erected and thus be legalized. In a prior decision of the Circuit Court of Appeals for the Third Circuit, this distinction was clearly pointed out. In *Delaware, L. & W. R. Co. v. Chiara*, 95 F. 2nd 662, the same Circuit Court of Appeals held that where a structure, which was otherwise a

nuisance, was erected in strict accordance with a statute and an ordinance specifying the location and character of the obstruction, the obstruction was legalized.

In its opinion in the case at bar, the Circuit Court of Appeals failed to distinguish between general statutory authority and statutes specifically, precisely, exactly and definitely authorizing a structure which would otherwise be a nuisance.

#### **Reasons Relied on for Allowance of the Writ**

1. The Circuit Court of Appeals completely disregarded the well-established common law of New Jersey that a municipality is responsible in damages for its active wrongdoing in performing an act authorized by law.

2. The Circuit Court of Appeals entirely overlooked the local law of New Jersey that the performance of a governmental duty, imposed by legislative enactment upon a municipality, in a wrongful manner, subjects the municipality to liability for the consequences of such wrongful performance.

3. The Circuit Court of Appeals completely ignored its own decision in *Delaware, L. & W. R. Co. v. Chiara*, 95 F. 2nd 662, that an obstruction in the highway can be legalized only by specific, definite, exact and precise legislation, but, on the contrary, held that general legislation alone was sufficient to absolve the defendant from liability for an obstruction erected on the highway in an improper manner.

4. The Circuit Court of Appeals entirely overlooked the well-defined distinction laid down in the New Jersey decisions between the wrongful performance of an authorized act and the performance, in a specified manner, of an act authorized by precise, specific, exact and definite authority.

5. The Circuit Court of Appeals has, by this decision, overruled the common law of New Jersey as to municipal liability and has created a conflict between the Federal Courts and the State Courts on the liability of the municipality for its positive acts of misfeasance.

6. The Circuit Court of Appeals either overlooked or failed to apply the law of New Jersey as expressed in *Hammond v. County of Monmouth*, 117 N. J. L. 11; 186 Atl. 452, and since consistently followed, that, notwithstanding the authorization by the Legislature of an act, the failure to provide proper protection or to perform the act in a proper manner, is active wrongdoing and positive misfeasance for which the municipality is liable.

7. The Circuit Court of Appeals disregarded the common law of New Jersey as laid down in *Sammak v. L. V. R. Co.*, 112 N. J. L. 540; 172 Atl. 60, and *Howard v. L. V. R. Co.*, 106 N. J. L. 466; 150 Atl. 356, that the erection of a structure in the highway which would otherwise be a nuisance, can only be legalized by definite, specific, exact and precise legislative authority.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit, be granted.

Dated, March 29, 1944.

ELEANOR G. MURPHY,  
*Petitioner,*

By THEODORE D. PARSONS,  
*Counsel for Petitioner.*

